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# State Crime in the Federal Forum

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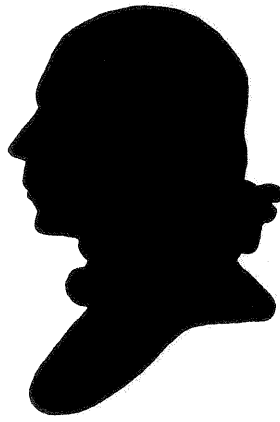
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*The University of Pennsylvania Federalist Society  
Presents*

**A SYMPOSIUM  
on  
THE FEDERAL JUDICIARY:  
ITS PROCEDURE AND PURPOSE**

*1990 Atlantic Symposium of the Federalist Society*

October 20, 1990  
University of Pennsylvania Law School  
Philadelphia, Pennsylvania

THE FEDERAL JUDICIARY: ITS PROCEDURE AND PURPOSE  
ATLANTIC SYMPOSIUM OF THE FEDERALIST SOCIETY  
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL  
OCTOBER 20, 1990

STATE CRIME IN THE FEDERAL FORUM

The federal criminal law is a wondrous thing. It is composed of about 3,000 separate provisions scattered throughout the U.S. Code. It criminalizes such things as reproducing the image of "Woodsy Owl" and "Smokey the Bear" (18 U.S.C. §§ 711, 711(a)); transporting false teeth into a state without permission of a local dentist (18 U.S.C. § 1821); detaining a carrier pigeon owned by the United States (18 U.S.C. § 45); transporting water hyacinths in interstate commerce (18 U.S.C. § 46); issuing a check for a sum less than \$1 intended to circulate as currency (18 U.S.C. § 336) (I confess to a total inability to understand this offense); issuing false crop reports (18 U.S.C. § 2072); and issuing a false weather report on the representation that it is an official weather bureau forecast (18 U.S.C. § 2074). It is also a crime for an unauthorized United States citizen to communicate with a foreign government with the intention of influencing that government relative to any disputes with the United States. This statute, known as the Logan Act (18 U.S.C. § 953), has never formed the basis of a prosecution since it was passed in 1799. As far as I can tell, the only people who regularly brush up against the Logan Act are members of Congress on overseas tours.

When I met with Dick Thornburgh in the Attorney General's Office about a year ago, I told him that I considered the revision, consolidation and simplification of the federal criminal law to be a national priority. He agreed that the project was long overdue and whipped out of his desk a yellowed report prepared many years ago when he was an Assistant Attorney General in the Justice Department. The report apparently was the result of a study of federal crimes that had been undertaken with a view toward a revision of the federal criminal statutes. The Attorney General seemed interested in reviving the project, and I offered to help in any way possible. On January 22 of this year, in a speech to the Society for the Reform of Criminal Law, the Attorney General spoke of the need for comprehensive codification but gave no indication that the government would go forward with the project in the near future. He was content to discuss the failed efforts of the past and to encourage his audience to pursue the matter. I suppose that the Attorney General and the Justice Department have other fish to fry, but I think that the project is important enough to be undertaken by a Commission composed of members from all three branches of government. I urge the appointment of such a Commission in the interest of the fair and efficient administration of federal criminal justice.

Congress has demonstrated no capacity for self-restraint in exercising its authority to define federal crimes. The expansive interpretation of the Commerce Clause, allowing as it does the criminalization of activities affecting commerce, no matter how

remotely, has permitted Congress to pass criminal legislation at an alarming rate. Credit card fraud (18 U.S.C. § 1029), computer fraud (18 U.S.C. § 1030), and cattle rustling (18 U.S.C. § 667) have been added in recent years. Much of the federal criminal law is a public relations job. Congress passes a law prohibiting one thing or another and announces that the problem has been solved. The fact is that very few violations of those 3,000 federal criminal statutes can be prosecuted. Resources are limited -- investigative, prosecutorial and judicial. There are only 575 federal district judges in the nation, and there are only so many cases they can handle. Federal prosecution of crime is necessarily selective, and federal prosecutors are constrained to decline many more cases than they can accept for prosecution.

Consider the statistics: 10 years ago, there were 30,000 criminal filings in the district courts. Now there are nearly 50,000 criminal filings each year. The percentage increase for 1990 is twice that for 1989. Filings continue to outpace terminations, and the pending caseload rose by 12% at the end of 1989. Despite the rising numbers, the state courts are far and away the primary fora for the prosecution of criminal cases. It is estimated that 95% or more of the criminal prosecutions in the nation take place under state jurisdiction. In the state of New York alone, nearly <sup>80,000</sup> 70,000 felony cases were filed in 1988. <sup>120,000</sup> Almost 45,000 of those cases were filed in New York City. Three hundred and thirty thousand non-felony cases were filed in New York City in 1988. New York City felony filings exceeded 50,000

in 1989. Compare these figures with the figures for total nationwide federal criminal filings in 1989 -- 46,700. The states remain the first line of defense against crime. If this is so, it seems especially senseless to prosecute what are essentially state crimes in the federal forum, given the limitations of federal criminal prosecution.

\* In 1973, Henry Friendly, a judge of the nation's foremost appellate court, wrote a treatise on federal jurisdiction, civil and criminal. Addressing the Mann Act, which then criminalized the interstate transportation of women for immoral purposes, Judge Friendly posed this question: "Why should the federal government care if a Manhattan businessman takes his mistress to sleep with him in Greenwich, Connecticut, although it would not if the love-nest were in Port Chester, N.Y.?" (Friendly, Federal Jurisdiction, A General View 58 (1973)). The Mann Act since has been amended and now criminalizes the interstate transportation of any person to engage in any sexual offense. (~~18 U.S.C. § 2421~~). Accordingly, it seems that it is a federal crime even today for that Manhattan businessman to take his mistress across state lines if, in doing so, he commits the offense of adultery in violation of some state law. The question persists: "Why should the federal government care?" 7

✓ Why indeed should the federal government be interested in a whole host of cases primarily involving violations of state law? Why should it be interested in embezzlement by a bank employee simply because the bank is insured by the Federal Deposit

Insurance Corporation? (~~18 U.S.C. § 656~~). Why should it be interested in theft from an organization solely for the reason that the organization receives a small stipend of federal funds? (~~18 U.S.C. § 666~~). Why should it be interested in fraud just because the mails are remotely involved? (~~18 U.S.C. § 1341~~). Why should it be interested in state-defined gambling offenses for the sole reason that interstate travel is involved? (~~18 U.S.C. § 1952~~). Why should it be interested in extortion where the only added element is that commerce is somehow "affected?" (~~18 U.S.C. § 1951~~). And what possible interest can the federal government have in a local "loanshark," whose activities have absolutely no connection with interstate commerce? (~~18 U.S.C. § 892; Perez v. United States, 402 U.S. 146 (1971)~~). \*

\* I for one think that the time has come to define clearly the national interests in the area of criminal jurisdiction. The purpose of this is not only to have a leaner, cleaner federal criminal code, but also to render unto the states that which is better, more efficiently and more frequently prosecuted by the states. I think that large-scale interstate and international criminal activity should be the province of the national government, which also should have in reserve the power to deal with crime where there has been a complete breakdown of local and state law enforcement. Some scholars believe that this power resides in the constitutional requirement that the United States guarantee to every state a republican form of government. (U.S. Const. Art. IV Sec. 4). \*

If there is one overarching theme relating to our dual court system in the recent Report of the Federal Courts Study Committee, it is that state law should be applied by state courts. In the area of criminal jurisdiction, the Report contains this recommendation: "Federal prosecuting authorities should limit federal prosecutions to charges that cannot or should not be prosecuted in the state courts." (p. 35). In this regard, the Report notes that "[t]he federal courts' most pressing problems - today and for the immediate future - stem from unprecedented numbers of federal narcotics prosecutions." Id. Does the Federal Courts Study Committee exaggerate the problem? The statistics tell us that it does not. Drug cases account for a meteoric rise in the criminal dockets of the federal courts in the past 10 years.

Between 1980 and 1988, criminal filings increased by 50%, but the number of drug cases filed increased by 280%. In the five year period between 1985 and 1989, overall criminal filings increased by 17%, while drug filings increased by 75%. In the one year from 1988 to 1989, there was a 17% increase in drug filings. The estimate is that the 1988 to 1991 increase will be as much as 50%. Nationwide, drug prosecutions now account for nearly 30% of the criminal caseload, but, in a number of districts, drug prosecutions account for more than 50% of the caseload. Forty-four percent of federal criminal trials and 60% of all federal criminal appeals are narcotics cases, according to current statistics. In some district courts, little judicial



attention can be given to civil matters, including those of particular importance to large numbers of litigants, owing to the crunch of drug case overload. Judicial gridlock looms larger and larger as a consequence of the narcotics filings flood and the requirements of the Speedy Trial Act. The future does not bode well. Congress continues to appropriate more money for FBI and DEA agents and for federal prosecutors to process even greater numbers of cases in the federal public relations campaign against drug abuse. Meanwhile, the resources of the federal judiciary are in danger of being overwhelmed.

In spite of these frightening figures, it seems clear that only a small part of the drug war is being fought on the federal level. That is what I mean by the federal public relations campaign against drug abuse. In all of 1989, only 12,800 new drug cases were filed in the nation's federal courts. During that same period, 18,000 felony drug cases were filed in New York State alone. The states are in the front line of narcotics prosecution. It makes absolutely no sense to have federal prosecution of local street-level drug offenses, yet that is what is being done throughout the nation. The jurisdictional basis is the Drug Abuse Prevention and Control Act of 1970, wherein Congress found that "[f]ederal control of the <sup>intrastate</sup> ~~interstate~~ incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic." (21 U.S.C. § 801(6)). The statute authorizes federal prosecution of the otherwise local crimes of possession,

distribution and manufacture of narcotics and dangerous drugs. (21 U.S.C. §§ 841-56). It permitted a United States Attorney in the Southern District of New York to establish a "federal day," an arbitrarily selected day of the week when people arrested by city police for state crimes were prosecuted federally. It permitted Senator Biden to propose legislation establishing a national "federal day." Unfortunately, nothing has been heard recently regarding that legislation.

The problem of state narcotics crimes in the federal forum was recognized by the Federal Courts Study Committee. It found: "Many of the new drug cases now flooding the federal system could be prosecuted just as effectively in state courts under state laws. Over-reliance on federal courts for drug prosecutions will either force Congress to bloat the federal courts beyond recognition or force the federal courts to stop meeting their other constitutional and statutory responsibilities." (p. 36). The Committee made the following recommendations: "We urge Congress to provide additional resources to enable the federal courts to process the drug cases that belong in those courts. But federal funding should no longer serve as an incentive to bring cases into federal courts that could and should be prosecuted in the state courts. Some of the funds that Congress has approved for drug enforcement should be used to provide assistance for drug enforcement at the critical state and local levels, including resources for state courts, public defenders and assigned counsel." (p. 37-38). My own view on this is that

the investigation, detection and prosecution of large-scale international and interstate narcotics offenses should be conducted at the federal level, leaving the rest to state and local authorities supported in part by federal funding.

The federalization of criminal law has had and will have significant and dangerous consequences, as I have attempted to demonstrate in some articles I have written. (The Consequences of Federalizing Criminal Law, 4 Crim. Just. 16 (Spring 1989) (ABA Journal of the Section of Criminal Justice); Federal Courts, Federal Crimes, and Federalism, 10 Harv. J.L. & Pub. Pol'y 117 (1987)). Nowhere is the federalization of criminal law more apparent than in the federal drug laws. There is now no alternative to the conclusion of the Federal Courts Study Committee that "[b]oth the principles of federalism and the long-term health of the federal judicial system require returning the federal courts to their proper, limited role in dealing with crime." (p. 36).